

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

IN RE: PHARMACEUTICAL INDUSTRY
AVERAGE WHOLESALE PRICE
LITIGATION

MDL NO. 1456

THIS DOCUMENT RELATES TO:

TRACK 2 SETTLEMENT

CIVIL ACTION: 01-CV-12257-PBS

Judge Patti B. Saris

**CLASS PLAINTIFFS' MOTION FOR APPROVAL OF FORM OF NOTICE TO
CASH PAYING CONSUMERS IN CLASS 3, APPROVAL OF CONSUMER
CLAIMS SCHEDULE, AND TO RESCHEDULE DATE FOR FINAL
APPROVAL OF THE TRACK TWO SETTLEMENT**

With respect to the Track Two Settlement, Class Plaintiffs submit this motion seeking Court approval of the form of notice to cash paying consumers in Class 3, approval of a revised schedule establishing opt-out, objection and claims filing dates for those cash-payor consumers as well as consumers in Class 1, and to reschedule the date for the final fairness hearing related to the Track Two Settlement, currently scheduled for October 21, 2009. Class Plaintiffs have conferred with the Track Two Defendants and the Track Two Defendants do not oppose this Motion. A proposed form of order is attached hereto for the Court's consideration.

On April 27, 2009, the Court held a fairness hearing to consider approval of the Track Two Settlement. At that time Class Counsel was awaiting data from CMS in order to provide notice to Class 1 of the settlement using CMS contact and payment data. In addition, the Court indicated that it had questions concerning the adequacy of the Class 3 notice as it related to cash payors only. In addition, the Court heard from various objectors to the settlement and sought further clarification on some aspects of the settlement.

Class Counsel intend to file a further response to the Court's comments and concerns raised by objectors prior to the rescheduled final approval hearing. In the meantime, Class Counsel seek to update the Court on the status of notice to Class 1 and seek approval of the supplemental notice to cash payors as well as the form of that notice and to establish a schedule of important dates related to both Class 1 consumers and cash paying consumers in Class 3.

As the Court is aware, notice to Third Party Payors in Class 2 and Class 3 was completed earlier this year and the time for the filing of TPP claims and requests for exclusion passed in March, 2009. The Court-appointed claims administrator is currently auditing and processing TPP claims in the Track Two Settlement. Accordingly, nothing herein relates to an extension or rescheduling of any dates related to TPP claims or requests for exclusion.

A. Notice to Class 1

As the Court will recall, direct mail notice to Class 1 (Medicare recipients) is to be accomplished using data obtained from CMS. This data was previously obtained from CMS and used for purposes of direct mail notice to Class 1 consumers in both the GSK AWP settlement and the Class 1-only settlement with AstraZeneca. Class Counsel have not yet received this data from CMS as it relates to Class 1 consumers with Track Two claims but expect to obtain such data by October 31, 2009. Class Counsel understand that this delay is due to CMS's decision to award its third party data contract to a new vendor. Among other tasks, the vendor manages and fulfills CMS data requests. As part of the transition, the new CMS vendor was required to load all CMS data into its data systems. Due to the amount and complexity of the data maintained by CMS, as related by the vendor, the process has taken far longer than expected. Class Counsel have been informed that the process of loading CMS data is now complete and that the vendor is now processing the request for Class 1 data related to the Track Two Settlement.

B. Approval of Supplemental Notice Program and Form of Notice to Cash Payors

In order to address the Court's concerns that the notice previously published and targeted towards consumers in Class 3 was not clear as to the fact that cash payors are included in the settlement, Class Counsel requested that Katherine Kinsella of Kinsella Media, LLC (previously Kinsella/Novack Communications) design a supplemental notice program to reach cash paying consumers in Class 3. Class Counsel also requested that the supplemental notice program be focused on those forms of notice that are more likely to drive claims among AWP consumer class members.

Given previous experience in a number of settlements in this case, it appears that the greatest number of claims among consumer class members has been driven by both 30 second cable television spots as well as by internet banner ads. This is evidenced by the fact that claims rates in the original notice program spiked considerably in the period of time during which similar cable television spots and banner ads appeared. Thus, the supplemental notice proposed by Kinsella, as outlined on Exhibit 1 attached hereto, focuses exclusively on reaching cash payors through these two forms of media.

1. Cable Television

The proposed supplemental notice program provides for a 30 second television advertisement to be run approximately 60 times during a two-week period. The script of the proposed television ad is attached hereto as Exhibit 2. It is identical to the television spot previously run to reach Class 3 consumers in the Track Two Settlement with the exception that it adds the words "If you paid cash" to the beginning of the television spot. The script will appear on screen as indicated in Exhibit 2 and will also be read aloud by an announcer as the words appear on the screen.

2. Internet Banner Advertisements

As with the original notice program, the supplemental program includes internet banner ads displayed on targeted websites using the 24/7 internet network. This network delivers thousands of impressions daily on hundreds of special interest websites related, including health, travel and other issues of interest to the targeted demographic – consumers who are 35 years of age or older. These banner ads will appear for a period of approximately 6 weeks and will create in excess of 250 million impressions among the visitors to these web pages. The proposed text of the internet banner ad is attached hereto as Exhibit 3.

C. Revised Schedule Related To Consumer Claims Only

In order to provide for the notice to consumer cash payors as well as to provide adequate time to process CMS data and provide consumers in Class 1 direct mail notice, Class Counsel requests that the Court reschedule the final approval hearing currently scheduled for October 21, 2009, and that the Court establish revised deadlines for the filing of requests for exclusion, objections, and claims for Class 1 consumers and cash payors in Class 3. The proposed schedule is set forth below for the Court's consideration:

<u>Event</u>	<u>Revised Date</u>
Filing of Materials in Support of Final Approval including Attorneys Fees	December 1, 2009
Filing of Request for Exclusion	Postmarked by December 15, 2009
Filing of Notice of Intention to Appear at Fairness Hearing Stating Reasons for Opposition to Proposed Settlement	December 15, 2009
Responses to Opposition to Proposed Settlement	January 4, 2010
Final Approval Hearing	_____, 2010 [[TBD by the Court (on or after Jan. 15, 2010)]]

Filing of Claim (Consumer Class Members Only)	February 1, 2010
---	------------------

For the reasons set forth above, Class Counsel respectfully request that the Court approve the manner and form of notice to cash payors and enter the schedule set forth above related to consumers only and that the Court enter the proposed Order filed herewith.

DATED: October 7, 2009.

By /s/ Steve W. Berman
Thomas M. Sobol (BBO#471770)
Edward Notargiacomo (BBO#567636)
Hagens Berman Sobol Shapiro LLP
55 Cambridge Parkway, Suite 301
Cambridge, MA 02142
Telephone: (617) 482-3700
Facsimile: (617) 482-3003

LIAISON COUNSEL

Steve W. Berman
Sean R. Matt
Hagens Berman Sobol Shapiro LLP
1301 Fifth Avenue, Suite 2900
Seattle, WA 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594

Jeffrey Kodroff
John Macoretta
Spector, Roseman Kodroff & Willis, P.C.
1818 Market Street, Suite 2500
Philadelphia, PA 19103
Telephone: (215) 496-0300
Facsimile: (215) 496-6611

Kenneth A. Wexler
Jennifer Fountain Connolly
Wexler Wallace LLP
55 W. Monroe, Suite 3300
Chicago, IL 60603
Telephone: (312) 346-2222
Facsimile: (312) 346-0022

Marc H. Edelson
Hoffman & Edelson LLC
45 West Court Street
Doylestown, PA 18901
Telephone: (215) 230-8043
Facsimile: (215) 230-8735

CLASS COUNSEL

CERTIFICATE OF SERVICE

I hereby certify that I, Steve W. Berman, an attorney, caused a true and correct copy of the foregoing, CLASS PLAINTIFFS' MOTION FOR APPROVAL OF FORM OF NOTICE TO CASH PAYING CONSUMERS IN CLASS 3, APPROVAL OF CONSUMER CLAIMS SCHEDULE, AND TO RESCHEDULE DATE FOR FINAL APPROVAL OF THE TRACK TWO SETTLEMENT, to be delivered to all counsel of record by electronic service pursuant to Paragraph 11 of the Case Management Order No. 2, by sending on October 7, 2009, a copy to LexisNexis File & Serve for posting and notification to all parties.

/s/ Steve W. Berman

Steve W. Berman